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Before the
Federal Communications Commission
Washington, D.C. 20554

DEC 22

DISPATCHED BY
MM Docket No. 93-304 ✓

In the Matter of

Amendment of Section 76.51
of the Commission's Rules
to Include Anaheim, California
in the Los Angeles-San
Bernardino-Corona-Fontana-
Riverside, California,
Television Market

NOTICE OF PROPOSED RULE MAKING

Adopted: December 8, 1993; Released: December 21, 1993

Comment Date: January 18, 1994

Reply Comment Date: February 2, 1994

By the Chief, Mass Media Bureau:

1. Before the Commission is a petition for rule making filed July 20, 1993, by Golden Orange Broadcasting Co., Inc. ("Golden Orange"), licensee of television station KDOC-TV, Channel 56 (Independent), Anaheim, California, to amend Section 76.51 of the Commission's Rules, 47 C.F.R. §76.51, to the add community of Anaheim as a designated community in the Los Angeles-San Bernardino-Corona-Fontana-Riverside, California, television market.¹ See *Report and Order* in MM Docket No. 92-259 (Broadcast Signal Carriage Issues), 8 FCC Rcd 2965, 2977-78, n.150 (1993).²

BACKGROUND

2. Section 76.51 of the Commission's Rules enumerates the top 100 television markets and the designated communities within those markets. Among other things, this market list is used to determine territorial exclusivity rights under Section 73.658(m) and helps define the scope of

compulsory copyright license liability for cable operators. See 47 C.F.R. §76.658(m) and 17 U.S.C. §111(f). Some of the markets consist of more than one named community (a "hyphenated market"). Such "hyphenation" of a market is based on the premise that stations licensed to any of the named communities in the hyphenated market do, in fact, compete with all stations licensed to such communities. See *CATV-Non Network Agreements*, 46 FCC 2d 892, 898 (1974). Market hyphenation "helps equalize competition" where portions of the market are located beyond the Grade B contours of some stations in the area yet the stations compete for economic support. See *Cable Television Report & Order*, 36 FCC 2d 143, 176 (1972).

3. In evaluating past requests for hyphenation of a market, the Commission has considered the following factors as relevant to its examination: (1) the distance between the existing designated communities and the community proposed to be added to the designation; (2) whether cable carriage, if afforded to the subject station, would extend to areas beyond its Grade B signal coverage area; (3) the presence of a clear showing of a particularized need by the station requesting the change of market designation; and (4) an indication of benefit to the public from the proposed change. Each of these factors helps the Commission to evaluate individual market conditions consistent "with the underlying competitive purpose of the market hyphenation rule to delineate areas where stations can and do, both actually and logically, compete."³ Section 4 of the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act"),⁴ which amended Section 614 of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. §614, requires the Commission to make revisions needed to update the list of top 100 television markets and their designated communities in Section 76.51 of the Commission's Rules. See Section 614(f) of the Act.

THE PETITION

4. According to Golden Orange, Anaheim is an integral part of the Los Angeles television market; the center of Anaheim is located approximately 21 miles from the center of Los Angeles -- in contrast to Corona and Fontana, which are, respectively, 38 and 44 miles from the center of Los Angeles.⁵ The petitioner states that Anaheim's 35-mile exclusivity protection zone⁶ is virtually encompassed within the combined 35-mile zones of San Bernardino, Corona and Fontana, with the result that a smaller market for purpose of Section 76.51 is wholly contained within a major television market. Further, it asserts that KDOC-TV's Grade B signal contour encompasses all of the designated communities in the market and is similar to the

¹ By *Report and Order* in MM Docket No. 93-207, DA 93-1444 (released December 7, 1993), Section 76.51 was amended to add Riverside, California, as a designated community in the subject hyphenated market.

² The Commission has delegated to the Chief, Mass Media Bureau, authority to act on petitions for rule making seeking market redesignation and has stated that it expects "that requests for specific hyphenated market changes that appear worthy of consideration will be routinely docketed and issued as rulemaking proposals." See *Report and Order* in MM Docket No. 92-259, 8 FCC Rcd at 2977-78, n.150 (1993).

³ See, e.g., *TV 14, Inc. (Rome, Ga.)*, 7 FCC Rcd 8591, 8592 (1992), citing *Major Television Markets (Fresno-Visalia, California)*, 57 RR 2d 1122, 1124 (1985). See, also, *Press Broadcasting*

Company, Inc., 8 FCC Rcd 94, 95 (1993).

⁴ Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

⁵ Referencing the request underlying the action in MM Docket No. 93-207, see note 1, *supra*, the petitioner also notes that Riverside, California, is 48 miles from the center of Los Angeles.

⁶ Section 73.658(m) of the Commission's Rules generally provides that a television station may obtain exclusivity in non-network programming against other stations located in communities within 35 miles and, for the top 100 markets, those licensed to designated communities in a hyphenated market specified in Section 76.51.

Grade B contours of other market-area stations,⁷ indicating that the station competes for audience and revenue in virtually the same area as stations licensed to those communities.

5. Golden Orange contends that despite the competitive makeup of the market, because Anaheim is not a designated community in the Section 76.51 market listings, KDOC-TV is not considered a "local" signal throughout the Los Angeles ADI. Specifically, it states that while stations licensed to communities designated in Section 76.51 are considered local for cable systems within the 35-mile zones of all listed communities in a given hyphenated market, the absence of Anaheim as a designated community in this market results in KDOC-TV's classification as a "distant" signal for market-area systems more than 35 miles from Anaheim -- placing KDOC-TV at a substantial competitive disadvantage to other stations for cable carriage of its signal without incurring distant signal copyright liability.⁸ Amendment of Section 76.51 as requested is essential, it maintains, to permit KDOC-TV to compete effectively against other market stations, and will benefit the public "by access to KDOC-TV's independent, foreign language and other minority programming."

6. Community Cablevision Company (CCC), a California corporation doing business as Dimension Cable Services, operator of a cable system serving subscribers within the subject market, filed an opposition to Golden Orange's proposal. CCC also filed with the Commission, on May 28, 1993, a Petition for Emergency Special Relief seeking to exclude a number of broadcast stations, for must-carry purposes, from certain communities in the Los Angeles area. KDOC-TV is not one of the stations referenced in CCC's special relief petition, but in its opposition to Golden Orange's instant request, CCC maintains that "including Anaheim in the Los Angeles hyphenated television market would only make it easier for KDOC to obtain must-carry rights in communities throughout the Los Angeles area by relieving it of its obligation to indemnify cable systems of the copyright liability that would otherwise be incurred as a result of its carriage." See Section 76.55(c)(2) of the Commission's Rules. CCC asserts that increasing the number of must-carry signals in this market is both an "over-

whelming burden" due to the large number of potential must-carry stations in the market, and a "corresponding diminution of [its] editorial discretion . . . [and its] . . . First Amendment rights."

DISCUSSION

7. Based on the facts presented, we believe that a sufficient case for redesignation of the subject market has been set forth so that this proposal should be tested through the rule making process, including the comments of interested parties. It appears from the information before us that KDOC-TV and stations licensed to designated communities in the television market as listed in Section 76.51 of the Rules do compete for audiences and advertisers throughout much of the proposed combined market area, and that sufficient evidence has been presented tending to demonstrate commonality between the proposed community to be added to a market designation and the market as a whole. Moreover, Petitioners' proposal appears to be consistent with the Commission's policies regarding redesignation of a hyphenated television market.

8. In this regard, CCC's allegations do not compel a contrary conclusion. As an initial matter, CCC's pleading is unauthorized.⁹ Moreover, KDOC-TV is not one of the stations referenced in CCC's special relief petition. Although CCC's petition is directed to the must-carry status of certain stations regarding specific communities and certain systems and certain systems within the subject ADI, Golden Orange's petition is instead directed to the copyright status of KDOC-TV if the station is carried by market-area systems within the ADI it already is entitled to carriage in. Thus, any action to amend Section 76.51 of the Rules as proposed is, in our view, without prejudice to CCC's efforts to defeat the must-carry status of stations on certain systems within the subject ADI.¹⁰ As to CCC's specific allegations regarding its "burden" regarding the potentially large number of potential must-carry stations in the market, the Commission is examining alternatives to market hyphenation to more accurately reflect the true level of competition among specific stations in large and complex ADI market areas.¹¹ Inasmuch as this proposal

⁷ Golden Orange notes that its transmitter is located at the same Sunset Ridge site as those of television stations KSCI and KZKI, both licensed to San Bernardino. It also points out that the transmission facilities of KRCA(TV), Riverside, California, proponent in MM Docket No. 93-207 to include Riverside as a designated community in the subject hyphenated market (See note 1, *supra*), are also located at the Sunset Ridge site. Golden Orange further states that amendment of Section 76.51 in this case will not expand KDOC-TV's market "to any significant degree *vis a vis* other market stations."

⁸ Section 76.58(d) of the Commission's Rules required a cable operator to notify all local television stations by May 3, 1993, that they may not be entitled to mandatory carriage on the system because such carriage may cause an increased copyright liability to the cable system. Under the provisions of Section 76.55(c)(2) of the Rules, a local commercial television station otherwise entitled to mandatory carriage need not be carried on market-area cable systems if the station is considered a "distant signal" under the copyright compulsory license (17 U.S.C. §111) and the station does not agree to indemnify the cable operator for the increased copyright liability. See *Report and Order* in MM Docket No. 92-259, 8 FCC Rcd at 2973-74.

⁹ CCC's pleading is inconsistent with the Commission's deter-

mination that, where appropriate, requests to amend Section 76.51 will be considered under an expedited rulemaking procedure without first seeking public comment on whether to issue a notice of proposed rulemaking based on the submitted petition. See *Report and Order* in MM Docket No. 92-259, 8 FCC Rcd at 2978.

¹⁰ See, e.g., *Notice of Proposed Rulemaking* in MM Docket No. 93-290 (Newton, New Jersey and Riverhead, New York), 8 FCC Rcd 8136, n.2 (1993). Thus, while special relief petitions are the appropriate vehicle to examine specific questions of carriage with respect to individual television stations and cable systems, requests to amend Section 76.51 of the Rules, such as the instant request, are instead directed to the copyright implications of stations if carried in the ADI in which they are already entitled to mandatory carriage.

¹¹ *Id.* See also *Notice of Proposed Rulemaking* in MM Docket No. 93-291 (Lawrence, Massachusetts), 8 FCC Rcd 8171 (1993). Among the matters the Commission has sought comment on in those proceedings are possible alternative mechanisms short of market hyphenation to address the problems of individual stations operating in large markets under existing rules. In those cases where market hyphenation may not be appropriate, comment is sought on whether appropriate rule waivers or "partial

affects the nation's second largest market, interested parties, including CCC, may wish to address the issues raised in that proceeding in relation to the instant proposal.

ADMINISTRATIVE MATTERS

Ex Parte Rules -- Non-Restricted Proceeding

9. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, provided they are disclosed as provided in the Commission's Rules. See generally 47 C.F.R. §§ 1.1202, 1.1203 and 1.1206(a).

Comment Information

10. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **January 18, 1994**, and reply comments on or before **February 2, 1994**. All relevant and timely comments will be considered before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

Initial Regulatory Flexibility Analysis

11. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because if the proposed rule amendment is promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601 (3) of the Regulatory Flexibility Act. A few cable television system operators will be affected by the proposed rule amendment. The Secretary shall send a copy of this *Notice of Proposed Rule Making*, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

Additional Information

12. For additional information on this proceeding, contact Alan E. Aronowitz, Policy and Rules Division, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

hyphenation" of large markets might be preferable, or whether all communities to which stations are licensed may warrant

inclusion in a proposed hyphenation.